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Via Email and Hand Delivery

October 16, 2018

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RE: Final Supplemental Environmental Impact Report for the IKEA Retail Center Project (State Clearing House Number 2017082047)

Dear Mayor Haubert, Vice Mayor Hernandez, and Honorable City Councilmembers:

I am writing on behalf of Laborers' International Union of North America Local Union No. 304, and its many members living in an around the City of Dublin concerning the Final Supplemental Environmental Impact Report ("FEIR") prepared for the IKEA Retail Center Project (State Clearing House Number 2017082047) ("Project"). After reviewing the FEIR, together with our consultants, it is clear that the document fails to comply with CEQA, and fails to adequately analyze and mitigate the Project's impacts. LIUNA urges the City to revise the EIR to adequately describe, analyze, and mitigate the Project and its impacts. A revised EIR should be recirculated to allow public review and comment.

LIUNA submits herewith comments of the civil and traffic engineer Daniel Smith, Jr., whose expert comments and curriculum vitae are attached hereto as Exhibit A. LIUNA also submits herewith comments of wildlife ecologist Shawn Smallwood, Ph.D. Dr. Smallwood's expert comments and curriculum vitae are attached hereto as Exhibit B. These experts and our own independent review demonstrate that the FEIR is woefully inadequate and that a revised EIR should be prepared prior to Project approval to analyze all impacts and require

implementation of all feasible mitigation measures, as described more fully below.

I. PROJECT DESCRIPTION

IKEA Retail Center (PLPA-2016-00016). The proposed project involves the development of approximately 432,099 square feet of commercial uses on 27.45 acres. The project would be anchored by an IKEA store of approximately 339,099 square feet and feature up to 93,000 square feet of lifestyle retail-restaurant uses. The Project will be located at 5344 and 5411 Martinelli Way - Assessor Parcel Number 986-0033-005-02 & 986-0033-006-00. The Project site includes almost 2 acres of wetlands. (DEIR, p. 3.2-2).

II. STANDING

Members of Local Union No. 304 (“LIUNA”) live, work, and recreate in the City of Dublin and in the immediate vicinity of the Project site. These members will suffer the impacts of a poorly executed or inadequately mitigated Project, just as would the members of any nearby homeowners association, community group, or environmental group. Hundreds of LIUNA Local Union No. 304 members live and work in areas that will be affected by traffic, air pollution, and water pollution generated by the Project.

In addition, construction workers will suffer many of the most significant impacts from the Project as currently proposed, such as from air pollution emissions from poorly maintained or controlled construction equipment, possible risks related to hazardous materials on the Project site, and other impacts. Therefore, LIUNA Local Union No. 304 and its members have a direct interest in ensuring that the Project is adequately analyzed and that its environmental and public health impacts are mitigated to the fullest extent feasible.

III. LEGAL STANDARDS

A. EIR

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report (“EIR”) (except in certain limited circumstances). (See, e.g., Pub. Resources Code, § 21100.) The EIR is the very heart of CEQA. (*Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.) “The ‘foremost principle’ in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” (*Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 109 (“*CBE v. CRA*”).)

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. (14 Cal. Code Regs. (“CEQA Guidelines”) § 15002(a)(1).) “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made.

Thus, the EIR ‘protects not only the environment but also informed self-government.’” (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.) The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.” (*Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal. App. 4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.)

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures. (CEQA Guidelines, § 15002(a)(2) and (3); See also, *Berkeley Jets, supra*, 91 Cal. App. 4th at p. 1354; *Citizens of Goleta Valley, supra*, 52 Cal.3d at p. 564.) The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.” (CEQA Guidelines, §15002(a)(2).) If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.” (Pub. Resources Code, § 21081; CEQA Guidelines, § 15092(b)(2)(A) & (B).)

While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A ‘clearly inadequate or unsupported study is entitled to no judicial deference.’” (*Berkeley Jets*, 91 Cal. App. 4th at p. 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal. 3d 376, 391 409, fn. 12 (1988).) As the court stated in *Berkeley Jets*, 91 Cal. App. 4th at p. 1355:

A prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal. App. 4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946.)

B. SUPPLEMENTAL EIR

Recirculation of an EIR prior to certification is required “when the new information added to an EIR discloses: (1) a new substantial environmental impact resulting from the project or from a new mitigation measure proposed to be implemented (cf. CEQA Guidelines, § 15162, subd. (a)(1), (3)(B)(1)); (2) a substantial increase in the severity of an environmental impact unless mitigation measures are adopted that reduce the impact to a level of insignificance (cf. CEQA Guidelines, § 15162, subd. (a)(3)(B)(2)); (3) a feasible project alternative or mitigation measure that clearly would lessen the environmental impacts of the project, but which the project's proponents decline to adopt (cf. CEQA Guidelines, § 15162, subd. (a)(3)(B)(3), (4)); or (4) that the draft EIR was so fundamentally and basically inadequate and conclusory in nature

that public comment on the draft was in effect meaningless.” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal. 4th 1112, 1130, citing *Mountain Lion Coalition v. Fish & Game Comm’n* (1989) 214 Cal.App.3d 1043.)

Significant new information requiring recirculation can include:

- (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
- (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.
- (3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it.
- (4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.

(CEQA Guidelines, § 15088.5(a).)

The FEIR fails to analyze significant environmental impacts pertaining to the Project and to fully consider available mitigation measures to address those impacts. A revised EIR is required to be prepared and recirculated to address these deficiencies.

IV. THE FEIR FAILS TO ANALYZE AND MITIGATE ALL POTENTIALLY SIGNIFICANT IMPACTS.

An EIR must disclose all potentially significant adverse environmental impacts of a project. (Pub. Resources Code, § 21100(b)(1); CEQA Guidelines, § 15126(a); *Berkeley Jets*, 91 Cal. App. 4th 1344, 1354.) CEQA requires that an EIR must not only identify the impacts, but must also provide “information about how adverse the impacts will be.” (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831). The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692 (“*Kings County*”).)

CEQA requires public agencies to avoid or reduce environmental damage when feasible by requiring mitigation measures. (CEQA Guidelines, § 15002(a)(2) and (3); See also, *Berkeley Jets*, *supra*, 91 Cal. App. 4th at p. 1354; *Citizens of Goleta Valley*, *supra*, 52 Cal.3d at p. 564.) The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided

or significantly reduced.” (CEQA Guidelines, §15002(a)(2).) If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.” (Pub. Resources Code, § 21081; CEQA Guidelines, § 15092(b)(2)(A) & (B).)

In general, mitigation measures must be designed to minimize, reduce, or avoid an identified environmental impact or to rectify or compensate for that impact. (CEQA Guidelines, § 15370.) Where several mitigation measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. (*Id.*, at § 15126.4(a)(1)(B).) A lead agency may not make the required CEQA findings unless the administrative record clearly shows that all uncertainties regarding the mitigation of significant environmental impacts have been resolved.

CEQA requires the lead agency to adopt feasible mitigation measures that will substantially lessen or avoid the Project’s potentially significant environmental impacts (Pub. Resources Code, §§ 21002, 21081(a)), and describe those mitigation measures in the CEQA document. (Pub. Resources Code, § 21100(b)(3); CEQA Guidelines, § 15126.4.) A public agency may not rely on mitigation measures of uncertain efficacy or feasibility. (*Kings County, supra*, 221 Cal.App.3d at p. 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).) “Feasible” means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors. (CEQA Guidelines, § 15364.) To demonstrate economic infeasibility, “evidence must show that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.” (*Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1181.) The EIR must provide evidence and analysis to show project cannot be economically implemented. (*Kings County, supra*, 221 Cal.App.3d at pp. 734-737.) This requires not just cost data, but also data showing insufficient income and profitability. (*See Burger v. County of Mendocino* (1975) 45 Cal.App.3d 322, 327 (infeasibility claim unfounded absent data on income and expenditures showing project unprofitable); *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 694 (upholding infeasibility finding based on analysis of costs, projected revenues, and investment requirements).) Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments. (CEQA Guidelines, § 15126.4, subd. (a)(2).)

A lead agency may not conclude that an impact is significant and unavoidable without requiring the implementation of all feasible mitigation measures to reduce the impacts of a project to less than significant levels. (CEQA Guidelines, §§ 15126.4, 15091.)

A. THE FEIR FAILS TO ADEQUATELY ANALYZE AND MITIGATE TRAFFIC IMPACTS.

1. The EIR Fails to Disclose the Severity of the Project's Impacts on Freeways.

The EIR's analysis and mitigation of traffic impacts is incomplete. When a section being analyzed reaches a traffic density in the LOS F range, the report does not disclose the actual vehicle density that would result. Smith, p. 2. Instead, it lists either a dash ("-") or a "greater than 45" indication (">45"). According to traffic engineer Dan Smith, under the "cumulative + Project" scenario, 25 of the 61 freeway sections analyzed will be at a "completely dysfunctional LOS F" in the AM, and 29 of the 61 in the PM. Smith, p. 2. It is not enough to disclose that the Project will make traffic worse. The EIR must disclose how much worse traffic will be. By failing to disclose the actual traffic density, the public and decision makers are deprived to the opportunity to understand the true severity of the Project's impact on traffic. *Id.* Moreover, without knowing just how bad traffic will be, it is impossible to know how much mitigation is required.

2. The EIR Understates the Project's Cumulative Traffic Impact.

The Final EIR adds the Zeiss Innovation Center, located directly across the street from the proposed Project, to the cumulative project list. However, the EIR categorizes the Zeiss project as "research and development" rather than "office," which is consistent with the planned employee density of the Zeiss project. Smith, p. 2. In doing so, the EIR understates the Zeiss project's trip generation by approximately 32 percent. Smith, pp. 2-3. As Mr. Smith concludes, the "understatement of Zeiss trip generation undermines the City's claim in the FSEIR that the inclusion of Zeiss in the cumulative project list does not material affect the conclusions of the analysis." Smith, p. 3. The cumulative traffic analysis must be revised to include an accurate description of the level of traffic that will be generated by the Zeiss project.

3. The FEIR Fails to Mitigate Significant Traffic Impacts.

The FEIR admits that the Project will have many significant impacts on traffic. However, the document fails to impose feasible mitigation measures to reduce or eliminate traffic impacts. For example, the EIR states:

The proposed project would contribute new trips to the intersection of Hacienda Drive and Martinelli Way causing a queue impact under Existing With Project Conditions. While mitigation measures are proposed to fully mitigate the impact, the proposed mitigations may not be feasible. Therefore, the residual significance is significant and unavoidable. (DEIR p. ES-3).

Additionally, extending the length of the northbound left-turn pocket by approximately 100 feet through median modifications and widening along the project frontage in order

to provide a second eastbound left-turn pocket at the intersection of Hacienda Drive and Martinelli Way would reduce the queue impact to less than significant. Should the widening along the project frontage to provide a second eastbound left-turn pocket not be feasible, the eastbound left turn movement queue impact would remain significant and unavoidable. (DEIR p. 3.6-70).

The proposed project would contribute new trips to freeway facilities that would operate at unacceptable levels (freeways and major arterials). All feasible mitigation measures are proposed to mitigate impacts; however, in certain cases, they would not fully mitigate the impact to a level of less than significant. In other cases, no feasible mitigation is available. Lastly, certain feasible mitigation measures require the cooperation of third-party agencies, which is not assured. Therefore, the residual significance is significant and unavoidable. (DEIR, p. ES-3).

The FEIR properly identifies mitigation measures capable of reducing certain traffic impacts to less than significant. However, the FEIR fails to impose those measure, determining that they may not be feasible. This fails to comply with CEQA.

CEQA defines “feasible” as capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors. (Pub. Res. Code § 21061.1.) The guidelines add “legal” considerations as a fifth factor that must be taken into account when determining whether a mitigation measure or project alternative is feasible. (CEQA Guidelines § 15364.) Neither the statute nor the guidelines provide any substantive insights on how to analyze the economic feasibility of an alternative or measure. The cases discussed below provide some insight as to how the courts have determined whether an alternative or measure is economically feasible.

Citizens of Goleta Valley v. Board of Supervisors (1988) 197 Cal.App.3d 1167, 1181 held that “evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.” See also, *Kings County Farm Burea v. Hanford*, 221 Cal.App.3d at 734-737 (EIR must provide evidence and analysis to show project cannot be economically implemented). For a private project, this requires not just cost data, but also data showing insufficient income and profitability. *Burger v. Mendocino*, 45 Cal.App.3d at 327 (infeasibility claim unfounded absent data on income and expenditures showing project unprofitable).

The FEIR does not demonstrate that the identified mitigation measures are infeasible. Unless there is an adequate showing of infeasibility, the City must impose the mitigation measures to reduce the Project’s significant traffic impacts.

B. THE FEIR FAILS TO ADEQUATELY ANALYZE AND MITIGATE BIOLOGICAL IMPACTS.

1. The Project Will Have Significant Impacts on Biological Resources.

Dr. Smallwood concludes that the biological analysis contained in the FEIR is woefully incomplete and inadequate, and is not based on substantial evidence. Dr. Smallwood visited the Project site on March 26, 2018 for one hour, and on April 14, 2018 for 30 minutes. During that time, he witnessed 21 species of wildlife, including 5 special-status species using the Project site. Smallwood, p. 2.

Dr. Smallwood states that the EIR “is grossly deficient in its assessment of potential impacts to special-status species of wildlife.” Smallwood, p. 7. As an example, the EIR states that “Four special-status wildlife species have the potential to occur within the project site: burrowing owl (*Athene cunicularia*), pallid bat (*Antrozous pallidus*), Townsend’s big-eared bat (*Corynorhinus townsendii*), and Yuma myotis (*Myotis yumanensis*).” EIR, p. 3.2-6. Yet in the two brief site visits Dr. Smallwood made to the Project site, he detected 5 special-status species on site, none of which were addressed in the FEIR, including the white-tailed kite, which is a fully protected species under the California Endangered Species Act. Smallwood, p. 7. See Figure 1 below for a photograph taken by Dr. Smallwood of a white-tailed kite foraging over the Project site on April 14, 2018. In addition, Dr. Smallwood also witnessed the following special-status species during his site visits: American kestrel, red-tailed hawk, turkey vulture, and California gull. Smallwood, p. 2. Photographs taken by Dr. Smallwood of these species at the Project site are shown below. Additional photographs are found in Dr. Smallwood’s comments, attached hereto.

Based on his observations, Dr. Smallwood concludes that, without the undeveloped Project site, a colony of white-throated swifts that nest in the nearby parking garage and forage over the project site would likely fail. Smallwood, p. 2. Likewise, the white-tailed kites observed by Dr. Smallwood foraging on site that likely nest nearby would likely discontinue nesting without this foraging site due to insufficient open space remaining in the area. *Id.*

In addition to those species observed by Dr. Smallwood, eBird postings reveal 23 special-status species of birds seen near the Project site, only one of which is addressed in the FEIR. Smallwood, p. 7. One of these listings shows that burrowing owls have been seen at the Project site, a picture of which is included below. The EIR is deficient for failing to analyze the Project’s impacts on any of these special-status species.

Looking at burrowing owls specifically, the EIR acknowledges a “moderate” potential for burrowing owl occurrence at the Project site. EIR, p. 3.2-6. Dr. Smallwood notes that this classification is misleading, however, because “the occurrence potential is not moderate, but rather certain due to eyewitness accounts of burrowing owls on site.” Smallwood, p. 9. A picture of a burrowing owl located at the Project site is shown in Figure 7 below. This conclusion of only a moderate potential for burrowing owls is also misleading because it was

made without conducting burrowing owl detection surveys consistent with the California Department of Fish and Wildlife (2012) Guidelines. *Id.* Without conducting burrowing owl surveys consistent with these standards, the EIR's conclusions regarding burrowing owls are not supported by substantial evidence.

The EIR must be revised to fully analyze and mitigate these impacts to biological resources.

Figure 1. *A white-tailed kite – a California Fully Protected species – forages over the site of the proposed IKEA Retail Center on 14 April 2018.*



Figure 2. *A red-tailed hawk hunts the proposed project site from an adjacent electric distribution pole on 26 March 2018.*



Figure 3. A red-winged blackbird calls from mustard on the site of the proposed project (left), and another harasses a white-tailed kite foraging over the blackbird's nesting territory (right).



Figure 4. A Bewick's wren calls from its nesting territory bordering the site of the proposed project (left) and a white-tailed kite stands vigil on his nesting territory on the project site (right).



Figures 5 and 6. American goldfinch (top) and male and female house finches (right) are breeding on the site of the proposed project on 14 April 2018.

Checklist S35833911

Location Hacienda Drive, between sidewalk and fence, Alameda County, California, US | Map |

Date and Effort Fri Feb 11, 2011
Protocol: Historical
Party Size: N/A
Observers: Susan Teefy
Comments: N/A

Species 1 species total [Hide Media](#)

1 Burrowing Owl

ML55862791 [Macaulay Library](#)

© Susan Teefy

Figure 7. eBird posting of one of the burrowing owls seen on the project site.

2. The FEIR Violates CEQA Because it Fails to Analyze the Project's Impact on Wildlife Movement.

CEQA requires an analysis of a Project's impact on wildlife movement. The FEIR does not analyze this impact on the grounds that "the project site is surrounded by urban development or infrastructure on four sides and is enclosed with a fence. These conditions preclude the possibility of wildlife movement occurring on-site. No impact would occur." EIR, 3.7-2. This conclusion is flawed because it fails to account for the many species of wildlife that fly, looking only at species that walk, slither, or crawl. Smith, p. 9. According to Dr. Smith, "[m]any species of wildlife likely use the site of the proposed project for movement across the region." *Id.*

While Volant Wildlife species (species that fly) fly during migration, dispersal, foraging patrols, and territory maintenance, they also require stop-over-habitat. Wildlife movement includes stop-over habitat used by birds and bats, but the EIR fails to analyze this potential impact. Smallwood, p. 9. "A project that removes stop-over habitat will interfere with the ability of many Volant species of wildlife to move across the region." *Id.*

Based on Dr. Smith's observations and research, he concludes that the "Project would cut wildlife off from stop-over and staging habitat and would therefore interfere with wildlife movement in the region." The FEIR violates CEQA because it fails to analyze the Project's impact on the movement of Volant species. Dr. Smith's comments are substantial evidence that the Project will have a significant impact on wildlife movement. The EIR must be revised to fully analyze and mitigate this impact.

3. The EIR Fails to Analyze the Project's Impacts on Wildlife from Additional Traffic Generated by the Project.

According to the FEIR, the Project will generate 9,637 new daily car and truck trips. EIR, 3.6-37. Yet the EIR provides no analysis of the impacts on wildlife that will be caused by an enormous increase in traffic on the roadways servicing the Project.

As a result of increased traffic resulting from the Project, Dr. Smallwood identified likely impacts to special-status species including the California red-legged frog, California tiger salamander, and American badgers. *Id.* As Dr. Smallwood notes, "regardless of whether they live on site, [these species] cross roadways that will experience increased traffic volume caused by increased traffic on roadways servicing the project." *Id.* at 13.

Vehicle collisions with special-status species is not a minor issue, but rather results in the death of millions of species each year. Dr. Smallwood explains:

In Canada, 3,562 birds were estimated killed per 100 km of road per year (Bishop and Brogan 2013), and the US estimate of avian mortality on roads is 2,200 to 8,405 deaths per 100 km per year, or 89 million to 340 million total per year (Loss et al. 2014). Local impacts can be more intense than nationally.

A recent study of traffic-caused wildlife mortality along a 2.5 mile stretch of Vasco Road in Contra Costa County (only a few miles south of the project site), California, revealed 1,275 carcasses of 49 species of mammals, birds, amphibians and reptiles over 15 months of searches (Mendelsohn et al. 2009). This fatality number needs to be adjusted for the proportion of fatalities that were not found due to scavenger removal and searcher error.

Many thousands of roadkill wildlife incidents have been reported to the UC Davis Road Ecology Center (Shilling et al. 2017). In 2017, one of the major hotspots of road-killed wildlife overlaps the project site (Shilling et al. 2017). In fact, the wildlife roadkill hotspot in the project area was found to be statistically highly significant (see Figure 5 of Shilling et al. 2017). The costs to drivers is also high (Shilling et al. 2017). Increased use of existing roads will increase wildlife fatalities (see Figure 7 in Kobylarz 2001). But not one word of traffic-related impacts appears in FirstCarbon Solutions (2018) – a gross shortfall of the CEQA review.

Smallwood, pp. 13-14.

The EIR must be revised to include an analysis and mitigation of the result increased traffic from the Project will have on wildlife.

4. The EIR's Cumulative Biological Resources Analysis Violates CEQA and is Not Supported by Substantial Evidence.

CEQA documents, such as the SMND, must discuss cumulative impacts, and mitigate significant cumulative impacts. 14 CCR § 15130(a). This requirement flows from CEQA section 21083, which requires a finding that a project may have a significant effect on the environment if “the possible effects of a project are individually limited but cumulatively considerable. . . . ‘Cumulatively considerable’ means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” A legally adequate cumulative impacts analysis views a particular project over time and in conjunction with other related past, present, and reasonably foreseeable probable future projects whose impacts might compound or interrelate with those of the project at hand.

The EIR fails to analyze the Project's cumulative impact on biological resources on the grounds that “The project site is located in an area characterized by urban development and infrastructure; accordingly, habitats in these areas tend to be characterized as highly disturbed, and impacts would be localized.” EIR, p. 4-3.

While it is true that the Project site is surrounded by urban uses, “it is not true that the loss of this patch of open space would result in only localized impacts.” Smallwood, p. 14. Dr. Smallwood concludes that:

[M]ultiple species of birds are traveling to the site to forage in support of nesting elsewhere. Losing this foraging area will likely result in the termination of an entire nesting colony of white-throated swifts as well as however many nests of white-tailed kites can be supported by the prey base on this site. The loss of stop-over habitat at this site would prevent many species of birds and bats from flying over a large land area because they will lose their last available habitat for resting or staging. Losing the habitat on this site would generate the ultimate effects of habitat fragmentation – the disproportionate loss of species’ capacity resulting from the loss of habitat.

Smallwood, p. 14.

In addition, the EIR claims that the Project will not have a significant cumulative impact on biological resources because the proposed preconstruction surveys for special-status species would mitigate for individual project impacts and therefore mitigate for cumulative impacts. EIR, p. 4-3. As Dr. Smallwood points out, this presents a false standard for determining whether a project’s impact will be cumulatively considerable. Smallwood, p. 14. It implies that a given project impact is cumulatively considerable only when the project impact has not been fully mitigated.

The conclusion that the Project will have no cumulative impact because its individual impact is not significant relies on the exact argument CEQA’s cumulative impact analysis is meant to protect against. The entire purpose of a cumulative impact analysis is to prevent the situation where mitigation occurs to address project-specific impacts, without looking at the bigger picture. This argument, applied over and over again, has resulted in major environmental damage, and is a major reason why CEQA was enacted. As the court stated in *CBE v. CRA*, 103 Cal. App. 4th at 114:

Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

(citations omitted).

A new cumulative impacts analysis is needed for the Project that complies with CEQA’s requirement to look at the Project’s environmental impact, combined with the impacts of other past, current, and probable future projects. A revised EIR must be prepared to fully analyze the Project’s cumulative biological impacts.

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5. The EIR's Cumulative Biological Resources Analysis Violates CEQA and is Not Supported by Substantial Evidence.

CEQA disallows deferring the formulation of mitigation measures to post-approval studies. 14 CCR § 15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309. An agency may only defer the formulation of mitigation measures when it possesses “‘meaningful information’ reasonably justifying an expectation of compliance.” *Sundstrom* at 308; *see also Sacramento Old City Association v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1028-29 (mitigation measures may be deferred only “for kinds of impacts for which mitigation is known to be feasible”). A lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation because there was no evidence that replacement water was available). This approach helps “insure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug.” *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

Moreover, “mitigation measure[s] [that do] no more than require a report be prepared and followed” do not provide adequate information for informed decisionmaking under CEQA. *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794; Guidelines § 15126.4(a)(1)(B). By deferring the development of specific mitigation measures, the City has effectively precluded public input into the development of those measures. CEQA prohibits this approach. As explained by the court in *Communities for a Better Env't v. Richmond* (2010) 184 Cal.App.4th 70, 92:

[R]eliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decisionmaking; and[,] consequently, these mitigation plans have been overturned on judicial review as constituting improper deferral of environmental assessment.

Here, the EIR admits that the Project may have a substantial impact on the Congdon's tarplant. To mitigate the impact, the EIR proposes mitigation measure BIO-1a, which requires a survey to determine the presence of Congdon's tarplants prior to any vegetation removal or ground disturbing activities. EIR, ES-9. If Congdon's tarplants are found on-site, then MM BIO-1a requires direct and indirect impacts of the Project on the species to be avoided “where feasible” through activity exclusion zones. *Id.* If avoidance of impacts on the Congdon's tarplant is not feasible, then:

The loss of individuals or occupied habitat of Congdon's tarplant shall be compensated for through the acquisition, protection, and subsequent management of other existing occurrences. Before the implementation of compensation measures, the project's applicant shall provide detailed information to the CDFW and lead agency on the quality

of preserved habitat, location of the preserved occurrences, provisions for protecting and managing the areas, the responsible parties involved, and other pertinent information that demonstrates the feasibility of the compensation.

A mitigation plan identifying appropriate mitigation ratios at a minimum of 1:1 shall be developed in consultation with, and approved by, the CDFW and the City prior to the commencement of any activities that would impact Congdon's tarplant.

A mitigation plan may include but is not limited to the following: the acquisition of off-site mitigation areas presently supporting the Congdon's tarplant, purchase of credits in a mitigation bank that is approved to sell credits for the Congdon's tarplant, or payment of in-lieu fees to a public agency or conservation organization (e.g., a local land trust) for the preservation and management of existing populations of Congdon's tarplant.

EIR, pp. ES9 to ES-10.

This mitigation measure violates CEQA for numerous reasons. First, it constitutes deferred mitigation. It defers the preparation of a mitigation plan until after completion of CEQA review, without imposing any substantive standards, without providing for any public review, and subject approval by CDFW and the City. Moreover, interested parties are precluded from commenting on the adequacy of the Congdon's tarplant mitigation plan, even though CEQA requires that they be permitted to do so.

Second, there is no evidence that BIO-1a is feasible because there is no evidence that there are sufficient "other existing occurrences" of Congdon's tarplant available for "acquisition, protection, and subsequent management." The mitigation measure itself makes clear that there is no evidence that the measure is feasible, since it requires the Project applicant "provide detailed information to the CDFW and lead agency on the quality of preserved habitat, location of the preserved occurrences, provisions for protecting and managing the areas, the responsible parties involved, and other pertinent information **that demonstrates the feasibility of the compensation**." This is particularly true given that the mitigation ratio will not be determined until after the Project is approved. Moreover, the mitigation measure does not specify what the mitigation ratio refers to. Is it that individual plants shall be mitigated at a minimum of a 1:1 ratio, or that a certain amount of habitat?

Deferral of mitigation is also impermissible if it removes the CEQA decision-making body from its decision-making role. The City may not delegate the formulation and approval of mitigation measures to address environmental impacts because an agency's legislative body must ultimately review and vouch for all environmental analysis mandated by CEQA. *Sundstrom v County of Mendocino* (1988) 202 Cal.App.3d 296, 306-308. Thus, the EIR may not rely on programs to be developed and approved later by another agency. Yet that is precisely what MM BIO-1 does.

Here, the lead agency has improperly delegated its legal responsibility of determining

what constitutes adequate mitigation to the Project applicant and CDFW. MM BIO-1a provides:

Before the implementation of compensation measures, the project's applicant shall provide detailed information to the CDFW and lead agency on the quality of preserved habitat, location of the preserved occurrences, provisions for protecting and managing the areas, the responsible parties involved, and other pertinent information that demonstrates the feasibility of the compensation.

In other words, it is the Project Applicant, and not the lead agency that is formulating the mitigation measure. Moreover, the mitigation measure is subject to approval by CDFW.

Finally, there is no evidence to support the EIR's conclusion that a mitigation ratio of 1:1 is sufficient to reduce the impact to Congdon's tarplants to a less-than-significant level.

The FEIR may not rely on a Congdon's tarplant mitigation plan of unknown feasibility to be developed by the Project Application, subject to CDFW approval, at some future time after the CEQA process is complete. Without valid mitigation, the Project's significant impact on Congdon's tarplant remains significant.

Mitigation Measure BIO-1c also constitutes deferred mitigation. It provides that:

If avoidance of burrowing owls or their burrows is not possible, and project activities may result in impacts to nesting, occupied, and satellite burrows and/or burrowing owl habitat, the project applicant shall consult with the CDFW and develop a detailed mitigation plan that shall include replacement of impacted habitat, number of burrows, and burrowing owl in a ratio approved by the CDFW. The mitigation plan shall be based on the requirements set forth in Appendix A of the CDFW 2012 Staff Report on Burrowing owl Mitigation and the Plan shall be reviewed and accepted by CDFW and the City prior to the first ground-disturbing activities.

Just like MM BIO-1a, MM BIO-1c constitutes deferred mitigation, since the mitigation plan will not be developed until after the CEQA process is complete. In addition, in violation of CEQA, the burrowing owl mitigation plan ratio is subject only to the approval of CDFW, which constitutes an improper delegation of authority under CEQA. There is also no evidence that there is sufficient habitat available to mitigate impacts to burrowing owls.

Mitigation Measure BIO-1b is also flawed. That mitigation measure provides:

No more than 14 days prior to initial ground disturbance and vegetation removal during the nesting season (February 1 to August 31), the project applicant shall retain a qualified biologist to perform preconstruction breeding bird surveys. If any nests are found, they shall be flagged and protected with a suitable buffer. Buffer distance will vary based on species and conditions at the site, but is usually at least 50 feet, and up to 250 feet for

raptors. This mitigation measure does not apply to ground disturbance and vegetation removal activities that occur outside of the nesting season (September 1 to January 31).

EIR, ES-10.

Again, this mitigation measure violates CEQA because it fails to establish a certain mitigation plan prior to Project approval. Instead, it requires that, if any nests are found, they should be protected with a “suitable buffer.” There is no explanation of what is meant by “suitable buffer” or how it will be determined what buffer is “suitable.”

The same is true for MM BIO-3b, which attempts to mitigate the loss of wetlands. That measure provides that:

Prior to any ground-disturbing activity on the site, the project applicant shall acquire appropriate permits under Section 404 of the Clean Water Act from the USACE if the wetlands are determined to be subject to USACE jurisdiction, and shall obtain Section 401 certification from the RWQCB and approval of a wetlands mitigation plan that meets the following standards. A mitigation plan shall be prepared that will establish suitable compensatory mitigation based on the concept of no net loss of wetland habitat values or acreages, to the satisfaction of the regulatory agencies. Specifically, a wetland mitigation plan shall be developed and implemented that includes creation, restoration, and/or enhancement of off-site wetlands prior to project ground disturbance. Mitigation areas shall be established in perpetuity through dedication of a conservation easement (or similar mechanism) to an approved environmental organization and payment of an endowment for the long-term management of the site. The mitigation plan shall be subject to the approval of the applicable regulatory agency (USACE and/or RWQCB) and the City.

EIR, ES-12 to ES-13.

There is no evidence that MM BIO-3b is feasible, it is uncertain, it defers mitigation, and it improperly delegates authority away from the lead agency.

Each of the above mitigation measures violates CEQA, and without valid mitigation measures, each impact these mitigation measures are meant to address remain significant.

C. THE FEIR FAILS TO ADEQUATELY ANALYZE AND MITIGATE AIR QUALITY IMPACTS.

The FEIR concludes that Project construction will have significant air quality impacts due to NO_x and ROG_s far above CEQA significance thresholds. (EIR p. 3.1-44). The FEIR recommends mitigation measures, including Tier 4 construction equipment and ultra-low VOC paints. These measures are projected to reduce emissions to slightly below significance

thresholds – approximately 52 pounds per day compared to a significance threshold of 55 pounds per day.

However, there is no showing that there is adequate availability of Tier 4 construction equipment to implement this measure. Also, the Project will have significant cumulative construction emissions together with other projects in the immediate vicinity. This includes the Carl Zeiss project and the Boulevard project (formerly the Dublin Crossing Project). The IKEA project will have significant cumulative construction emissions when considered together with the Zeiss and Boulevard projects. We incorporate the CEQA documents for the Zeiss and Boulevard projects by reference. Since all of the documents are in the City of Dublin’s possession, they should be included in the record for this IKEA Project.

An EIR must discuss significant cumulative impacts. CEQA Guidelines section 15130(a). This requirement flows from CEQA section 21083, which requires a finding that a project may have a significant effect on the environment if “the possible effects of a project are individually limited but cumulatively considerable. . . . ‘Cumulatively considerable’ means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” “Cumulative impacts” are defined as “two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.” CEQA Guidelines section 15355(a). “[I]ndividual effects may be changes resulting from a single project or a number of separate projects.” CEQA Guidelines section 15355(a).

“The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” *Communities for a Better Environment v. Cal. Resources Agency* (“*CBE v. CRA*”), (2002) 103 Cal.App.4th 98, 117. A legally adequate cumulative impacts analysis views a particular project over time and in conjunction with other related past, present, and reasonably foreseeable probable future projects whose impacts might compound or interrelate with those of the project at hand. “Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” CEQA Guidelines § 15355(b).

As the court stated in *CBE v. CRA*, 103 Cal. App. 4th at 114:

Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

(Citations omitted).

In *Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d at 718, the court concluded that an EIR inadequately considered an air pollution (ozone) cumulative impact. The court said: “The [] EIR concludes the project’s contributions to ozone levels in the area would be immeasurable and, therefore, insignificant because the [cogeneration] plant would emit relatively minor amounts of [ozone] precursors compared to the total volume of [ozone] precursors emitted in Kings County. The EIR’s analysis uses the magnitude of the current ozone problem in the air basin in order to trivialize the project’s impact.” The court concluded: “The relevant question to be addressed in the EIR is not the relative amount of precursors emitted by the project when compared with preexisting emissions, but whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin.” The Kings County case was reaffirmed in *CBE v. CRA*, 103 Cal.App.4th at 116, where the court rejected cases with a narrower construction of “cumulative impacts.”

Since the IKEA Project will have significant cumulative air quality impacts, the FEIR must analyze additional mitigation measures to reduce emissions.

D. THE FEIR FAILS TO ADEQUATELY ANALYZE AND MITIGATE HAZARDOUS MATERIALS IMPACTS.

The FEIR admits that the Project site includes soil contaminated with highly toxic chemicals. The EIR states:

The project site is listed on several hazardous materials databases compiled pursuant to Government Code Section 65962.5. These listings are associated with the project site’s past military use associated with Camp Parks. Several hazardous material investigations have occurred during the past 20 years and have identified the following issues: former fuel depot, former rail spur, metals and soil stockpiles.

EIR, p. 3.3-17.

The EIR offers only improper deferred mitigation to address this impact. The EIR states:

Prior to issuance of the first grading permit, the project applicant shall retain a qualified hazardous materials contractor to sample any soil stockpiles that may be present for polycyclic aromatic hydrocarbons (PAHs), diesel and oil range petroleum hydrocarbons, and polychlorinated biphenyls (PCBs). If sampling determines that concentrations of these substances exceed acceptable human health exposure levels, the applicant shall retain a qualified hazardous materials contractor to properly remove and dispose of the impacted soils. If sampling determines that concentrations of these substances do not exceed acceptable human health exposure levels, no further action is required.

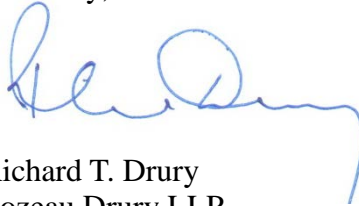
EIR p. 3.3.-17.

The EIR may not mitigate this significant impact by relying on a clean-up and removal plan that will be developed after Project approval. As discussed above, CEQA does not allow such deferred mitigation. This is of particular importance to LIUNA since construction workers will suffer the highest levels of exposure from contaminated soil disturbed during Project construction. A Revised EIR is required to propose specific mitigation measures to address the hazardous materials impacts.

V. CONCLUSION

For the foregoing reasons, LIUNA Local Union No. 304 and its members living in the City of Dublin and the surrounding areas, urge the City to require preparation of a revised EIR addressing the Project's significant impacts and mitigation measures. Thank you for your attention to these comments. Please include this letter and all attachments hereto in the record of proceedings for this project.

Sincerely,



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